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No. 88-1157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MARTIN MARIETTA CORPORATION,
Petitioner,

v.

WILLIAM C. POLLARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO THE MEMORANDUM IN OPPOSITION

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Respondent Pollard argues that "the case is much more complex than appears from the face of the Petition." Opp. at 6. To the contrary, the legal questions raised by the Petition are well and squarely presented on the existing record and by the decision of the court below.

1. While Pollard cites his theory that there were other waivers not discussed by the Court of Appeals, and argues his assertion that the underlying documents were not, in fact, privileged,[1] the Court of Appeals found a

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[1] Respondent's recitation of facts is replete with casual misstatements of fact for which no support can be given—or for which Respondent cites only his own prior unsupported assertions in the

waiver solely on the basis of the submission of the position papers to the United States Government. In so holding, it had no occasion to pass upon any other theory of waiver, or to determine whether the underlying documents were, in fact, covered by the attorney-client and work product privileges.

It was sufficient for the Court of Appeals that the submissions to the United States Government waived privileges associated with those documents; it was on that basis alone that they were ordered disclosed; and it is by that order that Martin Marietta is aggrieved. In connection with this petition, there is no need—indeed, in light of the limited scope of the judgment below, it would be improper—to consider any of Respondent's alternative theories why the documents ordered disclosed on the basis of a finding of implied waiver should now be ordered disclosed on the basis of factual findings that he is now asking this Court to make in the first instance.

Thus Respondent may be correct that "[a]lthough the case below was resolved to the satisfaction of the District Court and the Court of Appeals on the basis of the waiver doctrine, this is only but one of many hurdles that Martin Marietta must overcome to establish its claim that the materials at issue should not be released to respondent Pollard . . . ." Opp. at 6. But those additional "hurdles" for Martin Marietta are of no concern to the Court at this stage of the proceedings precisely because—as Pollard acknowledges—they had no role in the decisions of the courts below. Implied waiver was the sole basis for the Court of Appeals' determination that the documents in question must be produced to Pollard. This

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Cross-Petition or in some brief below. Those misstatements, however, bear no relation to the questions actually decided below and are thus irrelevant to this petition.

Court may assume, as did the Court of Appeals, that the documents involved are privileged.[2]

2. Respondent emphasizes that the position paper submitted to the United States Attorney included a quotation and disclosed:

> (1) the exact words the witness said; (2) the identity of the witness; and (3) the circumstances surrounding the statement including the question to which he was responding.

Opp. at 2. Beyond the fact that a company employee, speaking to the company's attorney, is not aptly characterized as a "witness," it bears emphasis that this case does *not* involve the question whether the position paper, including any "verbatim statements" (Opp. at 12 n.6) included in the paper, or anything else that was part of the position paper, is privileged. The issue presented by the petition is whether such a submission works a wholesale waiver with respect to *undisclosed* documents, as the Court of Appeals held.

It may be, as Pollard asserts, that a document voluntarily disclosed to some third party can no longer be regarded as privileged. Opp. at 11-12. *But see Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (privileges *not* waived either with respect to the submission to the Government or confidential communications on the same topic).[3] That principle does

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[2] The district court held that the documents were privileged, a conclusion not contested by Respondent in the Court of Appeals. Thus, at a minimum, there is a colorable basis for the privilege claims.

[3] A number of courts have held that disclosure of documents protected by the work product doctrine does not necessarily waive that privilege. *See, e.g., In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("[t]he purposes of the work product privilege are more complex, and they are not inconsistent with selective disclosure—even in some circumstances to an adversary").

not require the further conclusion that the fruits of an attorney's investigative efforts in preparation for litigation, reflected in documents that are *not* disclosed, but in some sense related to conclusory or partial disclosures made in the course of settlement discussions, are to be stripped of privilege. That question is the one presented here.

3. As his principal point, Pollard argues that he was "offered up" as a " 'bad apple' " by Martin Marietta and that this argument by Pollard should somehow affect the waiver issue. Pollard offers no legal theory why it should. The Court of Appeals assuredly did not rely on that theory as the basis for its finding of waiver.[4] In connection with waiver, the Court of Appeals rested exclusively upon the theory that Martin Marietta had made conclusory disclosures about its investigative efforts and quoted a client statement (thereby waiving the attorney-client privilege as to all related documents), Pet. App. 8a, and had made a "testimonial use" of privileged material by trying to induce an opposing party to settle (thereby waiving work product protection), Pet. App. 12a.

Pollard's theory and statements in this regard are not only irrelevant but untrue. He blithely asserts:

> The Government's case against Pollard was put together by Martin Marietta and is largely based upon allegedly privileged and protected information that Martin Marietta gleaned and supplied.

Opp. at 13. There is nothing in the record that even suggests that Martin Marietta "put together" the Government's case or that the Government relied on *any* "privileged and protected" materials in the preparation of its case against Pollard, or that the Government presented such materials to the grand jury, or that it would or

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[4] The Court of Appeals discussed Pollard's contention as part of its discussion of the relevance, admissibility and specificity requirements applicable to criminal subpoenas in general. Pet. App. 5a.

could use such materials against Pollard at trial. The Government did not have such materials, precisely because the materials that Pollard now seeks were not submitted to the Government. Not surprisingly, the Government (through the grand jury) subpoenaed thousands of Martin Marietta documents, which Martin Marietta "supplied" (Opp. at 13), and compelled the testimony of various Martin Marietta employees before the grand jury. But none of that material was privileged.

If Pollard wants any of the documents that the Government has, in fact, subpoenaed from Martin Marietta, and that the Government might therefore use against him, Pollard may seek that material directly *from the Government* in the course of the criminal proceedings. No issue about documents actually given to the Government, or testimony to the grand jury, is presented here; this case is about undisclosed, confidential documents in the possession of Martin Marietta. In fact, even if the Government had somehow obtained the confidential notes of the attorneys who conducted the investigation, those materials could not be used against Pollard in the criminal proceeding.[5] *See* Fed. R. Evid. 802; *Palmer v. Hoffman*, 318 U.S. 109, 113-15 (1943) (documents prepared in anticipation of litigation are not within the business record exception to the hearsay rule). Pollard has not, and could not suffer any legal prejudice from the submission of Martin Marietta's position paper to the Government—the only disclosure at issue here.

4. While offering no analytical or practical rationale to support the holding of the court below, Pollard nonetheless asserts that the law is clear. Opp. at 14 n.8. In asserting this conclusion, the Opposition Memorandum

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[5] In addition, the position paper was submitted on the express understanding "that the government will not use information contained in this submission against our client *or any of the involved individuals*." Pet. App. 35a.

simply ignores the starkly contrary approaches to the same issues taken, for example, by the Second Circuit in *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) (extra-judicial disclosure does not waive privilege for undisclosed documents and communications) and the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (neither confidential information actually disclosed to government, nor related confidential information, is subject to discovery by third parties). As described in the Petition (at 11 n.4) and as set forth more fully in the briefs of Amici American Bar Association (at 2-3) and American Corporate Counsel Association (at 16-20), the absence of any guidance from this Court on the issue of waiver has produced "disarray" in the lower courts on an issue upon which a substantial measure of certainty is required.

Respondent does not contest the importance or currency of the question presented as it affects the day-to-day conduct of attorneys in both civil and criminal cases. The chilling effect of this decision and decisions like it on the investigative efforts of attorneys, on the one hand, and on the settlement of cases, on the other, makes this a case that will have a profound effect on the conduct of many cases, but the issue it raises will seldom present itself for review. The filing of briefs *amicus curiae* by the American Bar Association and the American Corporate Counsel Association in support of the petition highlights the significance of the issues raised here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted

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